# STATE OF MICHIGAN

# COURT OF APPEALS

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NANCY PERRY, Personal Representative of the Estate of KEYA A. PERRY, Deceased.

Plaintiff-Appellant,

v

KATHLEEN MCCAHILL, SANDRA SKOLNIK, JANE JACKSON, and JOHN MILLS,

Defendants-Appellees,

and

WAYNE-WESTLAND SCHOOL DISTRICT, LILLIAN LONGUSKI, JANICE KRYM, LINDA ANOLICK, CITY OF WESTLAND, and CITY OF WAYNE,

Defendants.

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UNPUBLISHED
April 30, 2002

No. 224556
Wayne Circuit Court
LC No. 98-823244-NO

Before: O'Connell, P.J., and White and Cooper, JJ.

O'CONNELL, P.J. (*concurring in part and dissenting in part*).

To the extent that the majority concludes that plaintiff has failed to present evidence to allow a reasonable factfinder to conclude that defendants Jackson and McCahill were grossly negligent, I agree. I also agree with my colleagues' conclusion that plaintiff has not presented evidence of gross negligence with respect to defendants' use of the flotation device for Keya. However, because plaintiff has failed to present evidence of gross negligence sufficient to overcome the immunity granted by statute, MCL 691.1407(2)(c), with respect to defendants Skolnik's and Mills' supervision of Keya, I would affirm the learned trial court's grant of summary disposition.

In granting defendants' motion for summary disposition under MCR 2.116(C)(10), the trial court properly articulated the relevant and controlling law, and specifically relied on our Supreme Court's recent decision in *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999). In a lengthy and well-reasoned bench ruling, the trial court held:

> [T]his is a motion for summary disposition based upon governmental immunity in that the individual defendants left in this case are government employees. In order to determine liability on the basis of a government employee, that [sic] you must prove there was gross negligence on the part of the government employee.
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> The statute defines gross negligence as so reckless as to demonstrate substantial lack of concern whether or not an injury will occur. That standard was also used in [*Maiden, supra*], a recent Supreme Court case addressing two cases involving governmental immunity and gross negligence.
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> This is the situation in which a severely retarded twenty-four year old was in an aquatic program and during the course of the aquatic program activities she was in the water and then had a problem in which the attendant defendants in the case attempted to rescue her and they performed CPR. However, she did pass away. At the time the autopsy report indicated seizure.
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> Even though there was a death involved, the question is whether or not the actions of the attendants were so reckless as to demonstrate a reckless substantial amount of concern whether or not the injury will follow.
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> * * *
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> Now there may be [an] argument there was negligence on the part of the individuals who were watching [plaintiff's decedent]. The issue of fact being whether they were watching her close enough. But that is set forth by the Supreme Court, negligence does not constitute a cause of action. It has to be gross negligence.
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> From the facts of this case, . . . I would find none of the activities of the defendants were such that they were so reckless as to demonstrate a substantial lack of concern whether or not an injury would follow. That there was nothing done by the Defendants which I would find would result in injury to the Plaintiff Decedent under the circumstances.

After a thorough review of the record in the light most favorable to plaintiff, I share the trial court's view that plaintiff's proofs in response to defendants' motion for summary disposition fail to raise a material question that defendant employees' conduct was so reckless to the extent that it demonstrated a substantial lack of concern whether injury resulted to Keya. As the trial court correctly observed, our Supreme Court has cautioned that "evidence of ordinary negligence does not create a material question of fact concerning gross negligence" sufficient to overcome governmental immunity. *Maiden, supra* at 122-123.

Even when viewed in the light most favorable to plaintiff, *id.* at 120, the record does not support plaintiff's allegations that defendants Skolnik and Mills were grossly negligent in their supervision and monitoring of Keya during the adaptive aquatics program. Indeed, the record

establishes that Skolnik closely observed Keya's, a proficient swimmer,[1] activity in the pool before undergoing a seizure. According to Skolnik's deposition testimony, on October 10, 1997, she adjusted Keya's life jacket once she entered the pool, and watched Keya as she swam from the shallow end, past the center, to the deep end of the pool. Keya was the only swimmer in the deep end of the pool. According to Skolnik, Keya swam for a very short period of time before Skolnik observed any problems from her position approximately fifteen feet away, and during that time Skolnik did not take her eyes off of Keya.

I do not share my learned colleagues' opinion that under the circumstances, the fact that a lifeguard was not present on the deck of the pool or that defendants did not engage in one-on-one supervision of Keya elevated their conduct to the high threshold of gross negligence. Indeed, it is undisputed that at the time of the tragic accident leading to Keya's death, the six students in the pool were supervised by Skolnik and two paraprofessionals, Kathleen McCahill and Jane Jackson. Both Skolnik and Jackson were certified lifeguards. Further, the record reveals that Skolnik and the paraprofessionals engaged in a guarding pattern, which essentially involved following the individual swimmers as they moved about the pool to supervise them. Similarly, I do not agree with the majority that the record evidences that Skolnik was so distracted by other swimmers and instructors present in the pool area that her conduct was grossly negligent.

Under the circumstances, viewing the record evidence in the light most favorable to plaintiff, I agree with the trial court that reasonable minds could not possibly differ regarding whether Mills and Skolnik's conduct "demonstrate[d] a substantial lack of concern for whether an injury result[ed]" to Keya. MCL 691.1407(2)(c). Therefore, I would affirm.

/s/ Peter D. O'Connell

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[1] According to the record, Keya was a fairly experienced swimmer. Specifically, she could perform the breast stroke above and below the water, float on the water face-down and on her back, and engage in rhythmic breathing for short distances.